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NO.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM

JOHN R. HELTON, ET AL.,
PETITIONERS,

V.

F.D.I.C., RECEIVER FOR VICTOR SAVINGS AND LOAN ASSOCIATION,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF OKLAHOMA

REPLY TO BRIEF IN OPPOSITION

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REPLY POINT ONE

There was no 'adequate and independent state law grounds' for the Oklahoma court of appeals to affirm the trial court's summary judgment. Reply to brief of respondent, pages 4 and 5.

It was not and *could not* be 'adequate and independent' because the appeal court NEVER DECIDED AND REFUSED TO DECIDE the sole and only appellate issue sumitted to it by the petitioners. It had NO APPELLATE JURISDICTION of the issues that it *purported* to decide.

The court of appeals *and* the respondent's brief *ignore* the mandatory duty of the Oklahoma court of appeals when

> "* * * the question of jurisdiction is an issue which is "primary and must be inquired into and answered by this court, both as to its own jurisdiction as well as to the jurisdiction of the court from which the appeal is taken, whether raised by any party or not." *Davis v. Sandlin, Okl.* 392 P.2d 722, 723 (1964; *Cavnar v. Cohlma, Okl.*, (1973), 44 OBJ 894 (March 6, 1973) as Modified, 44 OBJ 1719 (May 19, 1973)."
>
> "The general rule set forth in 5 Am. Jur.2d, Appeal & Error, § 987, is:
>
> "In civil cases it is a well recognized rule that questions not advanced on the original hearing will not be considered on petition for rehearing, except in unusual circumstances, *or where fundamental or jurisdictional error* is involved." (E.A.)" [Emphasis in orig.]

Pointer v. Hill, Okl. 1975 536 P.2d 358, 361. And,

> "4. Where a judgment is void for lack of jurisdiction of the trial court over the res, this court will reverse in order to permit the trial court to dismiss the action on jurisdictional grounds." [Syllabus by the Court.]

Harber v. McKeown, (1945) 195 Okl. 290, 157 P.2d 753.

Conclusion: The opinion and affirmance order of the court of appeals, is, itself, *corum non judice* and void. The court of apeals, *failed and refused* to perform its manditory duty. Manifestly, then, the action of that court cannot be an "adequate and independent state law grounds" decision. The brief of respondent has applied a rule of law where the bench case facts will not support the application. See, question two, front page, petition for certiorari.

The court of appeals *butchered* the record before it. It is stated in the last three paragraphs of its opinion. Appendix "B", Item 8, pages A-148 to A-150. These three pages state issues NOT presented for review. The court of appeals 'glossed' the issues PRESENTED for appeal with this sentence: "The amended petition in error added several contentions that the summary judgment violated the contesting partners constitutional rights * * *." Appendix "B", Item 8, page A-149. The First Amended Petition In Error starts on page A-105, Item 1, Appendix "B". The Petition In Error is a 'form'. Its sub-part "D" is found on page A-107. Its title is: "Issues and Errors proposed to be raised on appeal". These described issues and errors are found in Exhibit "C". Exhibit "C" is found on page A-115. Four *errors* are specified. The *issues* are stated on pages A-115 to A-188, inclusive. These issues fixed and determined the jurisdictional scope of review of the court of appeals. The issues assailed the summary judgment against the petitioners as a judgment that was *corum non judice* and a violation by the trial court of petitioners' 14th Amend-

ment, U.S. Constitution, due process rights. It was an extreme detailed complaint stating how *federal* due process had been denied by the trial court's action. It presented a lack of trial court sub-matter jurisdiction that occurred during the course and conduct of the summary judgment trial. It presented an issue that was the manditory duty of the court of appeals to review, regardless of whether or not it had been previously presented to the trial court!!! *It was an issue that was separate and independent of the issues of percentage liability, release and novation.* These last three issues were NOT presented for review. How they were or were not disposed of by the trial court were immaterial. The cases of *Pointer v. Hill* and *Harber v. McKeown, supra,* gauged the jurisdictional reviewing *DUTY* of the court of appeals, under Oklahoma law, *super-added thereto by* the command of Arts. VI, Parg. 2, and X, U.S. Constitution, and Amendment XIV's due process, and the command of *Scott v. McNeal,* 1904, 154 U.S. 34.

In addition to *Lawrence v. State Tax Commission,* 1932, 285 U.S. 276, 282, cited and quoted in the petition for certiorari, page 8, the standard used by this court in *McCoy v. Shaw,* 1928, 277 U.S. 302, 303, is applicable:

> "It is settled law that a judgment of a state court which is put upon a nonfederal ground, independent of the federal question involved and broad enough to sustain the judgment, cannot be reviewed by this court, *unless the nonfederal ground is so plainly unfounded that it may be regarded as essentially arbitrary or a mere device to prevent the review of a decision upon the federal question.* [Four cases cited are omitted]" (Emphasis added.)

The *refusal* of the Oklahoma court of appeals to perform its

mandated jurisdictional reviewing duty should *qualify* as "essentially arbitrary or a mere device to prevent the review of a decision upon the federal question."

REPLY POINT TWO

The petition presents a U.S. Constitutional question that merits this Court's attention. Reply to respondent's brief, page 5.

If the appellate issues in the Oklahoma court of appeals were 'percentage liability', 'release' and 'novation', respondent's brief would be correct. But they were not appellate issues in the court of appeals. They are not appellate issues in this court. The five lower federal court cases, (Petition, page 11), have no applicability to issues of 'percentage liability', 'release' and 'novation'. As to trial court subject matter jurisdiction, these five lower federal court cases make the lack of the trial court's subject matter jurisdiction CONCLUSIVE. They make it conclusive that *D'Oench* and 12 U.S.C. § 1823(e) have no application to *this* case.

Respondent's reference to the general jurisdiction of the trial court as being conferred by the Oklahoma constitution is unquestioned and undenied. But that matter is unconnected to the federal right and federal remedy that is created by *D'Oench* and 12 U.S.A. § 1823(e).

FSLIC sued petitioners to enforce their so-called guaranty agreements as arising under Oklahoma statutory guaranty agreement law, a jurisdiction case-class conferred on the trial court by Oklahoma's constitution. In the due order of proceedings by a brief, in support of a motion for summary judgment, *FSLIC asserted a new and different right and remedy, federal in origin.* This was a subject

matter jurisdiction from a different sovereign. In an Oklahoma district court, FSLIC would be able to enforce Oklahoma made guaranties under Oklahoma law. At the same time in the same Oklahoma case, FSLIC would invoke this set of federal law rights and remedies to escape FSLIC's burden, under Oklahoma law, to prove that its exhibited Oklahoma guaranty agreements proved petitioners' liability to be what FSLIC had alleged that petitioners owed FSLIC. *Turner v. Cox,* 1929, 138 Okl. 225,27, 280 Pac. 568, *Williams v. Phillips Pet. Co. et al.,* 1969, Okl. Sup. Ct., 406 P. 2d. 474,477. Thereby, petitioners would be denied a day in court on the issue of their intended liability to FSLIC. The five federal court cases, cited on page 11 of the petition, hold that the above described 'court capers' could not be done. In the trial court's order refusing to reconsider, Appendix "A", Item 8, page A-90 et seq., the Honorable trial judge has written a resume of how *it happened.* How *it happened is condemned* by these five lower federal court cases. In respondent's brief, page 5, how it happened is said to be a 'misapplic[cation]' of *D'Oench* and 12 U.S.C. § 1823(e). What is *NOT* said is that it was a 'misapplication' of judicial power—i.e., subject matter jurisdiction. 'Misapplication' is a result of the exercise of 'discretion'. The trial judge had *no discretion* in selecting the subjects to be brought before him. *Worcester v. Georgia,* 1832, 6 Pet. 515, 541. This 'misapplication' produced a summary judgment against petitioners that was *corum non judice* and void. The void summary judgment against petitioners took their property without 14th Amendment, due process. *Scott v. McNeal, supra.*

RELIEF REQUESTED

The petition for writ of certiorari should be granted.

Respectfully submitted,

/s/ R. M. Helton

Petitioners' counsel of record.